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PUBLIC HEARING ON
ASSEMBLY BILL 938
APRIL 15, 2010

TESTIMONY OF KEITH R. CLIFFORD ON BEHALF OF THE WISCONSIN ASSOCIATION FOR JUSTICE

My name is Keith R. Clifford. I am a partner in the Clifford & Raihala law firm in Madison and a past president of the Wisconsin Association for Justice. Thank you for the opportunity to testify. I am here today to testify in favor of Assembly Bill 938.

It has been a longstanding policy of Wisconsin law that insurers must promptly pay every insurance claim. This concept is embodied in Wis. Stat. § 628.46 and its statutory predecessors. Section 628.46 provides that a claim is overdue if not paid within 30 days. If overdue, the insurer must pay interest on the claim. The intent of the legislation is to encourage prompt payment of claims.

The policy that insurers promptly pay claims is important. When a business suffers casualty losses for which it has insurance coverage, prompt payment of the business' claim is necessary to keep the business afloat during a difficult time. When a homeowner suffers a covered loss due to fire, prompt payment of the insurance claim is necessary to assure that the homeowner's family is provided shelter. And when a Wisconsin citizen is injured in a motor vehicle collision through the fault of another, it is important to that injured party and his family that his medical expenses, wage losses and bodily injuries

are compensated promptly. These are the interests that Wisconsin law has historically protected.

Historically, as well, insurance companies have conceded their legal duty to promptly pay every insurance claim, but they contended generally that duty only applied to payment of claims from their own insureds. The Wisconsin Supreme Court said otherwise, ruling that the policy of prompt payment under section 628.46 applies to claimants who have been injured by the negligence of another and have a claim against that person's insurance company (known as a third-party claimant). *Kontowicz v. American Standard Insurance Company*, 2006 WI 48, 290 Wis. 2d 302, 714, N.W.2d 105.

Since *Kontowicz,* insurance companies have followed a tactic of asking the trial court, under Wis. Stat. § 805.05, to bifurcate the claims and hold separate trials – one for the underlying claim and the second for the interest based upon an insurer's failure to timely pay – before two separate juries. This tactic imposes extraordinary additional costs not just on claimants but upon courts as well. In addition, it imposes a delay – likely many months between two separate trials – which is exactly the opposite of what the legislature intended in imposing the timely payment of claims policy under section 628.46.

Assembly Bill 938 eliminates these costs and delays while preserving the right of an insurance company to seek bifurcation. It provides that if an insurer seeks bifurcation, the Court may grant it but the separate trials will be before the same jury. This approach is frequently used in other settings where certain evidence – e.g., evidence of reckless disregard of the rights of a claimant in a claim for punitive damages – are deferred until after the underlying liability issues are decided by the jury. Under AB 938 bifurcation can occur if the requirements for granting bifurcation exist under section 805.05, yet the parties and courts are spared the extraordinary costs of separate jury trials with many months of delay in between the two.

AB 938 also addresses another issue. When insurance companies seek bifurcation before separate juries for claims brought under section 628.46, they also seek to delay any discovery of the reasons why they failed to make timely payment.

Under section 628.46, the only basis for an insurer to fail to make timely payment is if it had "reasonable proof to establish that the insurer is not

responsible for the payment." No one seriously contends that, where an insurer does not timely pay a claim under the statute, the claimant does not have a right to discover whether the insurer had "reasonable proof" that it was not responsible. As well, the claimant has the right to discover what that reasonable proof is.

However, in connection with motions to bifurcate, insurers have also requested the courts enter orders staying any discovery of their "reasonable proof" for nonpayment until after the trial on the underlying claim. Since AB 938 would require any bifurcated trial to be before the same jury, any discovery regarding that aspect of the trial would have to occur prior to the commencement of the single-jury bifurcated trial.

Indeed, it is difficult to conceive of any "reasonable proof" that the insurer was not responsible for payment that it would not introduce into evidence at a trial on the underlying claim. If, for example, the insurer believed that the plaintiff was negligent as well, it would obviously produce any evidence it has on that point at trial. If it had evidence that the plaintiff's injuries were unrelated to the motor vehicle collision at issue, it certainly would produce that evidence at trial. Indeed, we do not believe that an insurance company could make any argument that it would not present any evidence if, in good faith, it had such evidence that it was not responsible. Delay in discovering their "reasonable proof" does nothing more than delay proceedings, increase costs and overburden our courts. AB 938 avoids that.

AB 938 provides a uniform, statewide procedural correction to assure that every claimant will be treated uniformly throughout the state. At the same time it protects every insurer's interest in seeking bifurcation of section 628.46 claims if they can demonstrate that they meet the current requirements of section 805.05.

We believe that the provisions contained in section AB 938 are common sense and fair resolutions to assure access to justice to Wisconsin's citizens without imposition of unnecessary burdens of costs on them and on our courts. At the same time the bill protects insurers' rights to bifurcation when appropriate.

Thank you for this opportunity to testify.